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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 CHRISTIAN CHARLES,

4 Plaintiff,

5 v.

18 Civ. 1196 (AJN) (KHP)  
REMOTE ORAL ARGUMENT

6 JERRY SEINFELD, et al.,

7 Defendants.

8 -----x

New York, N.Y.  
September 23, 2020  
2:30 p.m.

9  
10 Before:

11 HON. KATHARINE H. PARKER,

12 Magistrate Judge

13 APPEARANCES

14 CLARK GUILDIN, ATTORNEYS AT LAW

15 Attorney for Plaintiff

16 BY: PETER L. SKOLNIK

17 GIBSON DUNN & CRUTCHER LLP

Attorneys for Defendants

18 BY: ORIN SNYDER

DAVID M. KUSNETZ

K9NQchaO

(The Court and all parties appearing telephonically)

THE COURT: Good afternoon. This is Judge Parker.

Chris, will you please call the case.

DEPUTY CLERK: Will do, Judge.

Judge, Alena Lynch will be our court reporter for today.

Calling case 18 Civ. 1196, Charles v. Seinfeld, the Honorable Katharine H. Parker presiding.

Would counsel for plaintiff please make your appearance for the record.

MR. SKOLNIK: Good afternoon, your Honor. This is Peter Skolnik for Christian Charles.

THE COURT: Good afternoon.

DEPUTY CLERK: Counsel for defendant, would you please make your appearance for the record.

MR. SNYDER: Yes. Good afternoon, your Honor. It's Orin Snyder, and I'm here with David Kusnetz. We represent Jerry Seinfeld, Columbus 81 Productions, and Comedians in Cars, LLC. I'm here with my colleague, David Kusnetz. I think I said that already.

THE COURT: Great. Yes. Good afternoon.

MR. SNYDER: Good afternoon.

THE COURT: All right. A few preliminaries before we get started. Normally I would be seeing you in my courtroom, but because we are still in the midst of the COVID pandemic, we

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1 are conducting this oral argument by telephone. This line is  
2 open to the press and public on a listen-only basis, and I want  
3 to remind everybody on the call that court rules prohibit the  
4 recording and rebroadcasting of court conferences including  
5 this one, and that violations of this rule will result in  
6 sanctions.

7 I would also ask that everyone on the phone keep your  
8 phone on mute. This will help with reception so that everybody  
9 can hear clearly, and to state your name before speaking. That  
10 is for the benefit of our court reporter, Ms. Lynch.

11 I also want to ask the parties to interrupt the  
12 proceedings if you cannot hear something that has been said.  
13 The court reporter I know will interrupt the proceedings if she  
14 has not heard something clearly, but it's important that  
15 everybody hear. Those are the preliminaries I wanted to  
16 review. And this is defendant's motion for attorneys' fees and  
17 costs.

18 So, Mr. Snyder, do you want to start or is your  
19 colleague going to argue?

20 MR. SNYDER: I'm going to proceed, your Honor. Thank  
21 you.

22 THE COURT: OK.

23 MR. SNYDER: Good morning, your Honor.

24 Not every losing copyright case wants attorneys' fees,  
25 but this losing copyright case as you saw in our brief really

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1 is a paradigm case for an award of attorneys' fees under the  
2 Copyright Act. If you look at Judge Nathan's decision, the  
3 Second Circuit summary order decision, the transcript of the  
4 Second Circuit argument which we've provided, what emerges is a  
5 picture of a lawsuit that never should have been filed in the  
6 first place. It was objectively unreasonable from the get-go,  
7 and plaintiff was warned repeatedly before he filed his lawsuit  
8 when he was proceeding, when he had lawyer number one who  
9 withdrew right after he filed a motion to dismiss, and then  
10 lawyer number two. Each was warned clearly that we were not  
11 going to pay any ransom in this case despite the negative  
12 publicity; that Mr. Seinfeld would spend money as much as he  
13 needed to reasonably to clear his name from the allegations of  
14 theft, and no more pernicious allegation can be brought against  
15 a creative person than calling that person a thief.  
16 Mr. Seinfeld obviously takes pride in his art, and the  
17 plaintiff was making what were really odious allegations, and  
18 he was warned at every step that he would lose because the  
19 Second Circuit law was crystal clear. He would lose because  
20 the arguments he was advancing and the allegations he made had  
21 been made time and again by plaintiffs who lost similar cases  
22 with similar arguments, all of which were affirmed by the  
23 Second Circuit, and that this was a mirror image of those  
24 losing cases, and that we would be here one day. We didn't  
25 know we'd be in a pandemic. We didn't know it would be by

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1 phone, but we knew and we repeatedly -- at least three times,  
2 if not more -- that there would come a day when he would be  
3 held accountable and we would ask the plaintiff to pay our  
4 attorneys' fees. And that day has come.

5 THE COURT: Mr. Snyder, let me ask you a question.  
6 The plaintiff's counsel, Mr. Skolnik, has said that -- as I  
7 understand his argument, that he was arguing for a novel issue  
8 of law or for a change in the law, and cites the recent *Everly*  
9 case as a basis for supporting his position that the case was  
10 not frivolous to begin with.

11 MR. SNYDER: Right.

12 THE COURT: So what do you say about that?

13 MR. SNYDER: Let me address it, your Honor.

14 It's nonsense. And he used that this is a novel  
15 argument -- this is a novel case twice. First he used it with  
16 Judge Nathan, and he said there's a difference between  
17 authorship and ownership. He was shut down summarily because  
18 that claim is discredited, has been discredited by the Second  
19 Circuit in the *Kwan* case and the *Simmons* case, which Judge  
20 Nathan cited and the Second Circuit cited. So the first time  
21 he used that this is a novel case argument was in his core  
22 theory, and Judge Nathan disagreed saying that the set of facts  
23 in *Kwan* largely mirrored the present case, meaning this notion  
24 that you call yourself an author or an owner has some legal  
25 distinction for statute of limitations is frivolous on its face

K9NQchaO

1 because it has been directly rejected by the Seventh Circuit.

2 In the summary order, the circuit said when ownership  
3 is the dispositive issue in an infringement case and the  
4 ownership claim is time-barred, then the particular claim  
5 itself is also time-barred even if any allegedly infringement  
6 activity occurred within the limitations period.

7 So, this notion that his original argument was novel  
8 and was laughed out of court, and I'll tell you, you know, and  
9 I just -- if you listen to Judge Lynch on the tape that we  
10 provided, no greater jurist on the Second Circuit than Judge  
11 Lynch. And he said, "It seems to me a very remarkable  
12 proposition that you can allow this to go forward and only at  
13 your convenience after the other side, meanwhile, has invested  
14 money in trying to develop the product and just come after them  
15 when it suits your convenience many years later." Not only did  
16 Judge Nathan throw him out of court on that novel argument, but  
17 the Second Circuit did.

18 So now he comes to your Honor and says, no, there's a  
19 new novel argument. The new novel argument is there's some  
20 circuit slip. And what he doesn't say -- I'll get to *Everly* in  
21 a moment -- he doesn't say under Second Circuit law, which, of  
22 course, governs *Kwan* and other cases we cite, his case is  
23 objectively reasonable. He doesn't make that argument. He  
24 doesn't say "Under *Kwan* my case was novel" because he can't.  
25 It's an absurd argument because the case law is so clear.

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1           So now he says the Sixth Circuit's decision this past  
2 May creates a circuit split and demonstrates that the Second  
3 Circuit got it wrong because plaintiff's claims for  
4 infringement of his copyright interest as author didn't accrue  
5 and the statute of limitations was not triggered by  
6 Mr. Seinfeld's clear repudiation. This argument is as wrong as  
7 wrong can be. If you read *Everly*, it is clear that there is no  
8 circuit court split at all.

9           Our reply brief makes clear that the Sixth Circuit did  
10 not hold that authorship claims are subject to a different  
11 statute of limitations regime than ownership claims. The Sixth  
12 Circuit held exactly what the Second Circuit held, exactly what  
13 Judge Nathan held in her decision; that the test for  
14 repudiation of authorship is exactly the same as the test Judge  
15 Nathan applied to dismiss plaintiff's ownership claims  
16 time-barred and that the Second Circuit applied in its summary  
17 averment.

18           So that *Everly* isn't harming me with the Second  
19 Circuit test, the decision itself, if you read it, which I did  
20 again this morning, it says that the test for the repudiation  
21 of ownership is derived from the Seventh Circuit's test for the  
22 repudiation of ownership claims.

23           This is what *Everly* says, quote -- I just circled the  
24 language about an hour ago -- "The express repudiation test  
25 should apply to such a claim for declaration of authorship

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rights as it does in the ownership context."

So, Judge Nathan and the Second Circuit held that Mr. Seinfeld made these private and public repudiations six years before plaintiff filed suit. Under *Everly*, under the Sixth Circuit's decision, Mr. Seinfeld's statement that the plaintiff was working on a work-for-hire basis and his decision to release the show in 2012 without crediting plaintiff was a repudiation, both of plaintiff's claim to ownership and his claim to authorship.

There is nothing novel here. All plaintiff is doing is attaching the label model to first below arguments that were thoroughly discredited by the Second Circuit case after case, and now because he has nothing to hang his hat on, he has completely butchered this Sixth Circuit case. And so even if the *Everly* test for repudiation of authorship claims governed in the Second Circuit, the result would be the same. It's the same standard.

This is why when Mr. Skolnik peddled this argument to the Second Circuit in seeking re-hearing from the Second Circuit's decision, the Second Circuit denied the petition without requesting any responsive briefing from us. There is no circuit split. No commentator or other case has identified a circuit split. There is nothing controversial about the Second Circuit's or Sixth Circuit's jurisprudence which says that if you repudiate a claim of authorship or ownership -- it



K9NQchaO

1 doesn't matter what you call it -- you have three years to sue,  
2 and he did not sue, and it is not a close call. This is as  
3 frivolous as a copyright case can be in the three-year statute  
4 of limitation repudiation regime.

5 The reason I say that is, your Honor, there -- what  
6 the Second Circuit looks at under 505 of the Copyright Act is  
7 frivolousness, motivation, and objective unreasonableness. On  
8 objective unreasonableness, I just went through why his  
9 arguments were from day one dead on arrival.

10 If you look at the Second Circuit's summary order, the  
11 language is clear that his whole argument was there's a  
12 difference between ownership and authorship, and the Second  
13 Circuit held the central issue is clearly, clearly a dispute  
14 over ownership. And then he also wrote plaintiff's argument is  
15 seriously undermined by his own statements.

16 So the court is using superlative language in its  
17 summary order consistent with the commentary all three judges  
18 made during the argument that we cite in our brief, that this  
19 was a shakedown case. And the reason I say that is on the  
20 motivation factor, plaintiff who is, you know, an experienced  
21 individual in the entertainment industry -- I'm sure he reads  
22 the trades -- knew that this show was out there, was winning  
23 awards, and he wasn't credited on it, but he only sued when he  
24 saw the money because Netflix announced this lucrative deal.  
25 The trade said a hundred million dollars. It doesn't matter

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1 what the amount was. We will stipulate that it was a lucrative  
2 deal for Mr. Seinfeld. And he knew that suing a man like  
3 Mr. Seinfeld would attract widespread media attention. That's  
4 just self-evident. And Judge Koeltl in the *Porto* case which we  
5 cite saw a similar scenario, and he said that targeting a  
6 high-profile defendant like this has the hallmarks of an  
7 abusive lawsuit. And to target Mr. Seinfeld again with  
8 allegations of theft, it's a well-known tactic used by  
9 plaintiffs to try to extract a settlement.

10 And the *Porto* case is on point because there, as here,  
11 the plaintiff waited to sue, waited in the wings, came out of  
12 woodwork when he saw a pot of gold, and was warned, as here,  
13 that the case was frivolous. And on that point, your Honor,  
14 you know, the stakes here were really high. The case may have  
15 been frivolous and objectively unreasonable from the outset,  
16 and it was, and just because Mr. Skolnik flashed a label that  
17 these were novel issues, the case law makes clear that they  
18 were bankrupt discredited issues allegations, which we made  
19 clear in our letters, which look a lot like our motion to  
20 dismiss.

21 Each time he wrote a letter, plaintiff or his counsel,  
22 they were lengthy citing all of these cases. And whether they  
23 assumed we were going to cave and pay money or whatever other  
24 reason, this is serious, and the stakes were high because as  
25 plaintiff alleges, the industry press estimated that the

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1 Netflix deal was worth a hundred million dollars, and plaintiff  
2 was seeking Mr. Seinfeld's entire share of the show's profit,  
3 as well as an injunction on making future episodes or  
4 distributing existent ones. And with those stakes, we were  
5 forced to vigorously defend our rights.

6 And going to the final issue of my argument, two  
7 issues, which I can combine, you know, the whole reason  
8 Congress passed Section 505 of the Copyright Act was for  
9 deterrence and compensation. And Judge Preska said it best in  
10 a case that's often cited when attorneys' fees are awarded in  
11 capitur cases, in the *Baker v. Urban Outfitters* case, and she  
12 wrote, "A award of fees and costs is necessary to convince  
13 plaintiffs that federal courts do not exist so they can roll  
14 the dice on unreasonable allegations or so that they could seek  
15 fame and fortune from deep-pocketed defendants."

16 And, you know, when people come to this court and  
17 invoke its powers, it's critical in the copyright area where  
18 the Copyright Act is designed to foster creativity and creative  
19 works, and when someone comes to court with a frivolous  
20 allegation, parties -- whether they're Jerry Seinfeld or a  
21 struggling artist -- you know, need to be compensated both  
22 because it's the fair and right thing to do and then future  
23 plaintiffs need to be deterred because you can't take a free  
24 shot in the hope that something will land or that big  
25 companies -- you know, they sued Netflix, they sued Sony, they

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1 sued Mr. Seinfeld, I'm sure thinking that they'd get a check  
2 because people write checks. But, unfortunately for the  
3 plaintiff, this was the wrong case and the wrong defendant  
4 because my client will not pay ransom. And in addition to  
5 being one of the funniest men in the world, Mr. Seinfeld is  
6 also one of the most successful men in show business, and  
7 because of his talent and success, Netflix offered him a deal  
8 to acquire the rights to this show, and this was a seminal deal  
9 for Netflix, and it served as another capstone on  
10 Mr. Seinfeld's successful career.

11 And as Judge Nathan recognized, it was this  
12 announcement in 2017 that prompted plaintiff to come out of the  
13 woodwork and then threaten a lawsuit. He didn't file one. He  
14 first threatened one privately. The implicit message is: If  
15 you don't pay me, I'm going to sue you, and, of course, there  
16 were headlines about the lawsuit that were dramatic and  
17 inflammatory, and now it's time for accountability.

18 THE COURT: OK. Mr. Snyder.

19 MR. SNYDER: Can I say the last point?

20 THE COURT: You can. I just want to ask you a  
21 question.

22 MR. SNYDER: OK. Go ahead.

23 THE COURT: Which is that wouldn't you want a  
24 plaintiff to raise the issue before just bringing a lawsuit? I  
25 mean, most defendants would want to have an opportunity to

K9NQchaO

1 learn about the case before it's filed and to potentially  
2 negotiate something if it was appropriate, if they deemed it  
3 appropriate.

4 MR. SNYDER: Well, I would say this: That if there  
5 was a good faith dispute for sure, but when you get a demand  
6 letter and it's frivolous and then you point out how frivolous  
7 it is -- and, again, if you read my first letter to plaintiff,  
8 it reads much like my motion to dismiss briefs three. We had  
9 to file three. We had to go through three rounds of briefing.  
10 It reads much like Judge Nathan's decision. It reads much like  
11 the Second Circuit's -- our briefs on appeal, and it reads much  
12 like the Second Circuit's both comments on the bench and its  
13 summary order.

14 There was no novelty here. There was no mystery here.  
15 This case was as dead on arrival as a copyright case can be.  
16 I've been practicing copyright for a lot of years, 30 years.  
17 Mr. Skolnik too. He is very experienced. And no one with a  
18 straight face can look at this case with the repudiations that  
19 occurred with the Second Circuit case law as it is and think  
20 that this was going to stick. It wasn't a close call ever, and  
21 there was nothing novel. You can take every argument that  
22 Mr. Skolnik made below and track it to arguments that were made  
23 in other cases where the Second Circuit affirmed dismissals.  
24 There was no open -- there was no opening. there was no crack  
25 in the jurisprudence. There was no open, dangling issue. This

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1 is as clear as clear can be. And that's why he's now pivoted  
2 to this Sixth Circuit argument, and I don't know how with a  
3 straight face anyone can say that the Sixth Circuit created a  
4 conflict when it cites the Second Circuit case law in support  
5 of its outcome, which is consistent with the Second Circuit's  
6 outcome here.

7 THE COURT: OK.

8 MR. SNYDER: And not to be too dramatic about it, but  
9 if there -- this is a very common fact pattern. People come  
10 out of the woodwork. They sue big companies and they sue  
11 creative people, and they say now that you're show is a success  
12 I'm an owner of it. You know, I handled a case years ago  
13 involving Rent that resulted in a Second Circuit decision,  
14 there the plaintiff a day after the show came out on Broadway,  
15 you know, filed a notice and said, "I'm a co-author." This  
16 fact pattern of waiting in the shadows, wait for succeed and  
17 then suing is common, which is why the jurisprudence is so  
18 consistent, and it's why when people like this plaintiff, you  
19 know, file lawsuits in clear violation of this case law, it's  
20 important for them to be held accountable because this is an  
21 abusive fact pattern, and in some cases, you know, it can be  
22 very, very costly and disruptive. Netflix and everyone else  
23 made their deals, and this guy comes out of the woodwork and  
24 raises his hand and says, "I'm entitled to all the profits."

25 THE COURT: I understand the point that you are

K9NQchaO

1 making, Mr. Snyder. A couple other questions that I have. In  
2 Mr. Skolnik's brief, he indicates that he is intending to file  
3 a petition for cert. with the U.S. Supreme Court, and if that  
4 happens, does that render this motion premature. There would  
5 be additional fees associated with that, and so I want your  
6 position on that.

7 MR. SNYDER: Sure. Thank you, your Honor.

8 As I understand it, from my colleague David Kusnetz --  
9 I haven't looked it up myself -- but he does say that he is  
10 going to appeal to the Supreme Court, but to our knowledge,  
11 plaintiff has not filed a cert. petition to the United States  
12 Supreme Court, and his time to do so expired weeks ago, so I  
13 think that this case is final. That's setting aside (A)  
14 whether he filed it timely, whether it would have been granted,  
15 which is a one in a million, and (2) if he wants to seek relief  
16 from, you know, his lateness, that's one in, you know, five  
17 million. So as far as I'm concerned, the case is over.

18 THE COURT: Then another question that I have for you,  
19 Mr. Snyder, is in your brief, you indicated that the fees that  
20 you are seeking represented a 25 percent discount from your  
21 regular --

22 MR. SNYDER: Yes.

23 THE COURT: -- rate, your regularly charged rate.

24 So maybe this is just my confusion, but the total  
25 amount that you're requesting, does that already factor in the

K9NQchaO

1 25 percent discount?

2 MR. SNYDER: Yes, your Honor, it does, and it's  
3 something I just -- it's my practice to always give myself a  
4 haircut even though courts have upheld similar rates at a  
5 hundred percent just because, you know, the numbers are  
6 obviously significant, and so I think it's a reasonable thing  
7 to do, but the answer is yes, the amount sought reflects the  
8 self-imposed 25 percent discount.

9 THE COURT: OK. Thank you.

10 Mr. Skolnik, I will hear from you next.

11 MR. SKOLNIK: Thank you, your Honor.

12 Let me address very quickly a point that Mr. Snyder  
13 just made about the timing of my cert. petition. Mr. Snyder is  
14 apparently not aware that back in March the Supreme Court  
15 automatically extended the time to file cert. petitions from  
16 the existing 90 days to 150 days. As it turns out, I was also  
17 unaware of that, and I filed a motion to extend with the late  
18 Justice Ginsburg, and it was returned on the grounds that it  
19 was unnecessary because there had been an automatic extension.  
20 So I am in fact still planning to file that cert. petition, and  
21 it is timely.

22 Mr. Snyder, you know, said he didn't want to be overly  
23 dramatic but he was, as he often is, both very dramatic and  
24 very glib. I had said in my opposition that it is this motion,  
25 this motion for fees that is frivolous, and in fact



K9NQchaO

1 Mr. Snyder's argument has raised that frivolousness to new  
2 heights.

3 Let's not forget that, as he clearly forgot or didn't  
4 bother to mention, that Mr. Charles and Mr. Seinfeld had an  
5 18-year relationship as collaborators before all of this arose.  
6 18 years. And when Mr. Seinfeld came to Mr. Charles for help  
7 with his career, which at that point was floundering because he  
8 had just come off a semi-disastrous B movie -- that is what it  
9 was called, a B movie -- and a totally disastrous television  
10 show called The Marriage Ref, and his managers were urging him  
11 to do something to get back in the game, it was Mr. Charles who  
12 came up with the idea of Comedians in Cars Getting Coffee.

13 But, look, let's not lose sight what this motion is  
14 about. It is not to re-litigate Mr. Seinfeld's motion to  
15 dismiss. It is not to argue whether the Second Circuit panel  
16 was right or wrong. It is not to decide whether the Second or  
17 the Sixth Circuit has the better or more correct interpretation  
18 of the efficacy of repudiations. It's not even to decide if  
19 the gravamen of Mr. Charles' suit is properly seen as a dispute  
20 about copyright authorship or ownership. This motion is about  
21 whether the defendants are entitled to almost a million dollars  
22 in legal fees because Mr. Charles filed a complaint that is  
23 frivolous and objectively unreasonable.

24 From the outset, Mr. Charles argued that Second  
25 Circuit law had never answered the question whether his

K9NQchaO

1 authorship could be repudiated by Mr. Seinfeld, who was not an  
2 author, who did not claim to be an author, and he did not  
3 become an author by the required written work-for-hire  
4 agreement or any other transfer of Mr. Charles,' rights and who  
5 was therefore, in Mr. Charles's paradigm, a stranger to the  
6 copyright.

7 From the outset, Mr. Charles argued that this was a  
8 question of first impression in the Second Circuit. The  
9 question had not been answered by Judge Pooler's decision in  
10 *Kwan v. Schlein*. It had not been answered by *Simmons v.*  
11 *Stanberry*. It had not, in fact, your Honor been answered by  
12 any federal court in the country. Mr. Charles argued that the  
13 answer to that question of first impression, whether a stranger  
14 to a authorship copyright had the power to trigger the statute  
15 of limitations through repudiations, whether the answer to that  
16 question should be no, such attempts to repudiate are  
17 ineffectual: They do not cause accrual of a claim under  
18 Section 507(b) of the Copyright Act. They do not trigger the  
19 running of the three-year statute of limitations period.

20 Because the question had never been answered at the  
21 time that Mr. Charles filed his suit, here or elsewhere, it was  
22 both a question of first impression and, to use the language of  
23 the requirements for a pleading under Rule 11(b)(2), it was  
24 non-frivolous argument for extending, modifying, or reversing  
25 existing law or for establishing new law. So, that was the

K9NQchaO

1 state of federal copyright law when Mr. Charles filed his  
2 complaint.

3 And from my perspective, as a former professor of  
4 international copyright law at Cardoza Law School, the  
5 complaint unquestionably raised a non-frivolous argument to  
6 extend or modify existing law for establishing the rule, and it  
7 did so, your Honor, even before the Sixth Circuit decided  
8 *Everly v. Everly*. The Second Circuit rejected my argument.  
9 Judge Nathan rejected my argument, but in the handful of days  
10 between argument in the Second Circuit and its issuance of an  
11 order, the Sixth Circuit provided its own well-reasoned answer  
12 to that question of first impression that Mr. Charles had  
13 raised, and it's an answer that eviscerates any argument that  
14 Charles' complaint was frivolous or objectively unreasonable,  
15 which, again, is the only question on this motion.

16 *Everly* decisively held that a limitations triggering  
17 in repudiation of ownership must be made by one who himself,  
18 unlike Mr. Seinfeld, claims authorship. *Everly* explains that  
19 the only repudiation that would have triggered the statute of  
20 limitations was a repudiation of Mr. Charles' authorship by  
21 another author.

22 Here is what the *Everly* court said -- and it said it  
23 unambiguously; I am not paraphrasing now. I'm quoting: "An  
24 authorship claim will not approve until the putative author  
25 status as an author is expressly repudiated. Actions

K9NQchaO

1 repudiating ownership are irrelevant to begin the statute of  
2 limitations for an authorship claim because repudiations of  
3 ownership is not adverse to the author's claim as such."

4 That's one quote.

5 Another: "regardless of whether repudiation of  
6 authorship is made privately, publicly or implicitly, it must  
7 come from someone asserting authorship of the work, not from a  
8 third party."

9 Here is another quote. "A person's authorship of a  
10 work can be legally called into question only if it is  
11 challenged by another person who himself claims authorship of  
12 the work in question."

13 Finally, your Honor, another quote: "In the context  
14 of authorship disputes, expressly, repudiation must be made by  
15 an author herself because, unlike ownership, authorship is not  
16 transferable by contract. Thus, the person repudiating  
17 another's authorship must herself have a claim in authorship in  
18 the work in question." Those are all direct quotes from  
19 *Everly*.

20 The Court should give no weight to defendant's  
21 suggestion that frivolousness was implied by the prompt denial  
22 of Mr. Charles's request for panel re-hearing. Our opposition  
23 explains that the Second Circuit, like most others, is famously  
24 reluctant to propagate intra-circuit conflict, and it is even  
25 more reluctant to reconsider its decisions based on authority

K9NQchaO

1 from outside the circuit.

2 Let me take a moment to address some of the  
3 defendant's arguments on reply which Mr. Snyder has reiterated  
4 during his argument. Most of the reply tries to re-litigate  
5 the facts and the merits of defendant's motion to dismiss; not  
6 to addressing whether the complaint was frivolous and  
7 objectively unreasonable. They insist that when Mr. Seinfeld  
8 asserted that Charles had only a "work-for-hire interest" in  
9 the pilot, he was implicitly repudiating Mr. Charles'  
10 authorship.

11 Well, first, the record is clear that Mr. Seinfeld was  
12 seeking to devalue only Mr. Charles' rights as the pilot's  
13 director, not as its author.

14 Second, under the *Everly* approach, it wouldn't matter  
15 if Seinfeld was repudiating, implicitly or explicitly, since he  
16 was not an author. Seinfeld did not even imply he was an  
17 author until a month before Mr. Charles sued. And, of course,  
18 defendant's work-for-hire argument slides right by the  
19 undisputed fact that no work-for-hire agreement was ever  
20 executed, and Mr. Seinfeld cannot call upon the work-for-hire  
21 doctrine to claim that he is, therefore, an employer who is  
22 "considered the author" under Section 201(b).

23 Defendants also insist that the question of  
24 frivolousness must consider only existing Second Circuit law,  
25 but that argument ignores both that Charles raised a question

K9NQchaO

1 of first impression and that he was making a bid to extend or  
2 modify existing Second Circuit law.

3 Your Honor, defendant's reply brief and Mr. Snyder's  
4 argument would have you believe that the Sixth Circuit's test  
5 for repudiation of authorship is identical to the Second  
6 Circuit's test for repudiation of ownership, and that *Everly*  
7 applies the same test that this court and the Second Circuit  
8 applied in this case. That argument is slick and glib and  
9 wholly disingenuous. They sewed together a garment whose  
10 tortured seams are showing. They piece together an *Everly*  
11 phrase from here, a snippet from there; disembodied quotes  
12 pulled out of context from cases drawn from hither and yon.  
13 It's a tattered costume that adds up to nothing because it does  
14 not and cannot refute *Everly*'s actual holdings that a person's  
15 authorship of a work can be legally called into question only  
16 if it is challenged by another person who himself claims  
17 authorship of the work, and an authorship claim will not accrue  
18 until the putative author status as an author is expressly  
19 repudiated.

20 Actions repudiating ownership are irrelevant to begin  
21 the statute of limitations for an authorship claim. Those  
22 holdings are directly 180 degrees contrary to the Second  
23 Circuit's tacit conclusion. *Everly* examined all species of  
24 repudiations, including through the absence of credit and the  
25 nonpayment of royalties. It analyzed cases from around the

K9NQchaO

1 nation, including, among many others, Judge Pooler's decision  
2 in *Kwan v. Schlein* and *Simmons v. Stanberry*, but in the end  
3 *Everly* swept them all aside because all of them failed to  
4 address who qualified to repudiate copyright authorship.

5 Is the Sixth Circuit conclusion *Everly* right? I  
6 submit as a matter of logic and policy it is, but it doesn't  
7 matter for purposes of this argument. This Court is not called  
8 upon to decide. I will be filing a cert. petition with the  
9 Supreme Court urging it to decide which of those diverse views  
10 from the Second or Sixth Circuit, which of those views should  
11 prevail. Since two courts reach different conclusions, it  
12 cannot be said that the position argued to either one of those  
13 courts was frivolous or objectively unreasonable.

14 What does matter today, and it is all that matters  
15 today, is that reasonable minds, reasonable judges and  
16 reasonable circuits can differ; and because that is so, no  
17 reasonable mind, no reasonable judge, no reasonable lawyer can  
18 conclude that raising the question was frivolous or objectively  
19 unreasonable.

20 So, your Honor, I will end this argument for now where  
21 I began my opposition to defendant's motion. The only  
22 frivolous and objectively unreasonable matter before this Court  
23 today is defendant's shameful motion, which entirely ignored  
24 *Everly's* very existence until Charles placed it squarely in the  
25 court's gunsights.

K9NQchaO

1 THE COURT: Thank you, Mr. Skolnik. How do you  
2 address Mr. Snyder's argument that your client has changed  
3 positions as to the issue before the Court, the settlement  
4 issue before the Court --

5 MR. SKOLNIK: Your Honor, there has been absolutely no  
6 change of position. Our position has consistently been that  
7 the question of whether or not as a non-author Mr. Seinfeld had  
8 the power to repudiate Mr. Charles' authorship, whether or not  
9 that has ever been addressed, and we have taken the position  
10 from the beginning that Judge Nathan's opinion didn't address  
11 it, that the Second Circuit didn't address it; and we have now  
12 simply said, well, finally, some court did address it, but the  
13 question has never been other than that.

14 THE COURT: OK. And how do you distinguish the *Porto*  
15 case that Mr. Snyder discussed?

16 MR. SKOLNIK: Well, your Honor, you know, the -- I  
17 will confess that I don't have the facts of *Porto* front to  
18 mind. I'm not even sure that it was briefed by either of  
19 defendants submissions. But to the extent that it simply says  
20 that, you know, there is a deterrence effect by the structure  
21 of the Copyright Act's requirement for a three-year period of  
22 repose and that courts should punish frivolous plaintiffs, all  
23 I can say is that this plaintiff's claims were not frivolous to  
24 begin with. They have been shown not to be frivolous now.

25 And in terms of deterrence, look, from the beginning



K9NQchaO

1 Mr. Charles and his -- I'm sorry -- Mr. Seinfeld and his  
2 colleagues, including his manager, his business manager, even  
3 according to some, his wife thought that Mr. Seinfeld was wrong  
4 about this, was being unduly stubborn, was not recognizing what  
5 Mr. Charles had done, and they were saying all of that at the  
6 same time that they were constantly saying that there was no  
7 money in this show. Mr. Seinfeld made that same statement to a  
8 mutual friend once the show was running for a few years on the  
9 Crackle platform. You know, there were no indicia that there  
10 was any money to be had here. The fact that Mr. Charles was  
11 not credited on the show is in its own way an outrage because  
12 the simple reason for that is that Mr. Seinfeld took the  
13 extraordinary step of seeing to it that nobody got any credits  
14 on the show. We all know when we watch a television show now,  
15 we're likely to spend the last five minutes, if we have the  
16 stomach for it, watching the credits. They credit everybody  
17 from the assistant to the second assistant hairdresser. There  
18 are no credits whatsoever on Comedians in Cars because  
19 Mr. Seinfeld apparently recognized that that would be a nice  
20 way of simply avoiding what role, if any, Mr. Charles had ever  
21 played. So, you know --

22 THE COURT: OK. Thank you.

23 The other question that I have for you is if you are,  
24 in fact, intending to serve and file a petition for cert., do  
25 you believe that this motion is premature and that its outcome

K9NQchaO

1 should await resolution on your anticipated cert. petition?

2 MR. SKOLNIK: Well, I have two views of that. One is,  
3 I think it in fact may be premature, and I think that, you  
4 know, the problem is that denial of a cert. petition -- you  
5 know, when I file my cert. petition, which I don't have to do  
6 now until sometime in early November, as Mr. Snyder recognizes,  
7 most cert. petitions are denied. So that denial may come very  
8 simply, very quickly, and without the defendants having to  
9 spend another ten minutes worrying about it or responding to  
10 it. You know, there's no obligation for them to oppose a cert.  
11 petition. So, in that regard, the whole question of whether  
12 additional fees would accrue prior to the time that the cert.  
13 petition was filed and ruled upon, if that ruling is in the  
14 negative, might have little or no impact whatsoever on the  
15 question of fees.

16 But beyond that, my other answer to the question is,  
17 should I be unsuccessful on this motion, as I certainly hope I  
18 won't be, I will certainly consider whether or not my cert.  
19 petition should include not only the issue of the circuit split  
20 between the Second and Sixth Circuits and there is --  
21 regardless of what Mr. Snyder is arguing, there is absolutely a  
22 circuit split on that base question of who has the power to  
23 repudiate. But if I were to lose this motion, I would  
24 certainly have to consider whether or not I would ask the  
25 Supreme Court also to address the proper standard for

K9NQchaO

1 evaluating claims of frivolousness and objective  
2 unreasonableness in pursuing a fee motion.

3 THE COURT: All right. And then your opposition  
4 rested principally on the argument that the lawsuit was not  
5 frivolous or objectively unreasonable because from your reading  
6 and interpretation of the laws, two circuits have come out  
7 different ways on the issue, which I understand either to be  
8 arguing that per se that would render the lawsuit not  
9 frivolous. You didn't say anything about the hours expended or  
10 the rate. Do you have anything that you wanted to argue about  
11 the reasonableness of the hourly rate requested or the hours  
12 expended?

13 MR. SKOLNIK: Well, to be candid, your Honor, no. I  
14 intentionally did not address that in my opposition, frankly,  
15 because I think that, you know, their entire fee petition,  
16 putting aside the calculation of the requested fees based upon  
17 their hourly rates, their entire fee petition rests on the sole  
18 proposition that Charles' complaint was frivolous and  
19 objectively unreasonable. And because I found that after  
20 *Everly* had been decided to be such an outrageously myopic  
21 position, it struck me that to waste time challenging whether  
22 or not Mr. Snyder is entitled to \$900 an hour or \$3 million an  
23 hour, I'm not going to sit here and argue with him about what  
24 his rates are.

25 I think that given how wrong he has been on this case

K9NQchaO

1 from the beginning, whatever he charged was excessive, but I'm  
2 not throwing that into the mix here. I just done like to get  
3 into quarrels with other lawyers about how much they should be  
4 charging or how much time they are spending.

5 I will note in passing, as long as we're on this  
6 subject, that their calculation of the time spent incorporates  
7 what seemed to be a fairly remarkable number of hours for their  
8 three different motions to dismiss. And I say a remarkable  
9 number of hours, because their motion to dismiss never changed.  
10 It was almost paragraph by paragraph cut and paste from one of  
11 their motions to dismiss to the next. So, how it is that they  
12 racked up all of these additional hours with the subsequent  
13 motions to dismiss sort of escapes me. But what are we going  
14 to do, have an interrogation to ask them why they had to spend  
15 27 hours researching the question that they had already  
16 researched and briefed the time before? It's not the way I  
17 like to practice law, your Honor.

18 THE COURT: I see. OK. Thank you very much.

19 Mr. Snyder, is there anything else that you would like  
20 to address that you haven't addressed already? Mr. Snyder?

21 MR. SNYDER: I'm so sorry, your Honor. I was on mute.

22 Yes, your Honor, just briefly. I want to just respond  
23 to a couple of the arguments. First is, I hope your Honor  
24 doesn't buy into the fiction - and it is a fiction - that there  
25 is a circuit split. There is no circuit split. There are no

K9NQchaO

1 diverse views that the Second and Sixth Circuit both apply the  
2 exact same uniform rule and every circuit that has addressed it  
3 that the statute of limitations is an absolute bar if you don't  
4 sue in three years, and it doesn't matter whether you call it  
5 an authorship claim or an ownership claim, there is no split,  
6 and no reasonable mind, judge or circuit, can adopt  
7 Mr. Skolnik's arguments. We've addressed this in our reply and  
8 cases on their face make it clear, there is no circuit split.

9 Two, on the frivolousness, I hope your Honor also  
10 doesn't buy into the idea that this was a non-frivolous  
11 argument to extend or modify law. All you have to do is look  
12 to Judge Nathan and the Circuit to see that this was *Kwan* in  
13 mirror image. There was no issue of first impression there.  
14 Mr. Skolnik is not the first lawyer to say ownership and  
15 authorship are different. The Second Circuit has made clear  
16 time and again that if you have notice and you don't sue, and  
17 it's six years later or three years a day, you're out of court  
18 whether you call yourself an author or an owner. Everything he  
19 said on that point was what he said below, is what he said to  
20 the Second Circuit, including the bizarre notion that  
21 Mr. Seinfeld is a stranger to the show. Every Judge, all four  
22 of them, who considered that argument scratched their heads  
23 because, of course, by saying to Mr. Charles, "I, Jerry  
24 Seinfeld, am not going to give you anything other than a  
25 work-for-hire status," he is obviously claiming to be the

K9NQchaO

1 author/owner of the show.

2 The next point is the -- in terms of prematurity, we  
3 urge your Honor to decide the motion now. One, cert. will be  
4 denied as sure as day follows night.

5 And, second, in *Mahan*, which we cite, the Second  
6 Circuit upheld a fee award by a district court and then ordered  
7 the district court to calculate a fee award based on the fees  
8 for making the appeal. We're happy to waive attorneys' fees  
9 for reading his cert. petition because certainly there will be  
10 no opposition required.

11 The next point is that in terms of his non-comment  
12 about our rates, our remarkable number of hours, I can tell you  
13 that because Mr. Kusnetz swears that this is the case or  
14 represents that this is the case, and I recall it as so, the  
15 fact is that we did have to write new briefs each time because,  
16 not surprisingly, each time we filed a motion to dismiss, the  
17 plaintiff has to rejigger and re-engineer his amended  
18 complaint, and we had to then accordingly deal with the new  
19 allegations and claims that were raised in his new complaint,  
20 including on one round they put in a dozen or so fact  
21 affidavits. We had to deal with that.

22 So, I just hope your Honor does not take either at  
23 face value or accept in any way the idea that there is a  
24 circuit splitting or that there is any issue of first  
25 impression. It's just not true, and so we hope that your Honor

K9NQchaO

1 will just apply the clear precedent that where you have the  
2 motivation and the objective unreasonableness, like you do  
3 here, attorneys' fees are appropriate.

4 Oh, *Porto*. We did cite *Porto* in our brief on page 15  
5 of our motion, and what I think is most important about *Porto*  
6 is that Judge Koeltl focused on the award-winning play and  
7 award-winning author, he focused on the fact there was a  
8 well-known director, who was an Academy Award winning actor.  
9 He focused on the fact that several years after the production  
10 of the play and its success the lawsuit was brought. And then  
11 focuses on another fact, which, "Plaintiff's first counsel was  
12 warned before any action had been filed that there was no  
13 colorable copyright infringement claim, and the plaintiff  
14 nevertheless persisted in obtaining new counsel and filing his  
15 complaint." In this case, the facts are even more aggravating.  
16 We warned, as I said, plaintiff in pro se capacity. We warned  
17 lawyer one. We filed a motion to dismiss and the day before I  
18 think his opposition was due, he withdrew, and Mr. Skolnik came  
19 in, and we warned him anew more than once in that writing. And  
20 in that Judge Koeltl found that an award of reasonable cost of  
21 attorneys' fees was appropriate, citing the aggravating factors  
22 that we have here: Famous defendants, successful play, waiting  
23 in the shadows, and then being warned and barreling ahead in  
24 the face of those warnings. So even *Porto* is even a  
25 less-compelling case for fees but Judge Koeltl comfortably

K9NQchaO

1 awarded them there. Thank you, your Honor.

2 THE COURT: Thank you.

3 MR. SKOLNIK: Your Honor, may I respond briefly?

4 THE COURT: Yes, you may, Mr. Skolnik.

5 MR. SKOLNIK: Let me just say in terms of a few points  
6 that Mr. Snyder either just made directly or indirectly.

7 First, is that there is a suggestion in their brief  
8 that the Court should consider that Mr. Charles is apparently  
9 well-healed because he was able to hire multiple lawyers.  
10 Well, the fact is that every lawyer that has represented  
11 Mr. Charles, or both of us, have been on contingency. So  
12 well-healed is nonsense.

13 For that matter, Mr. Snyder completely overlooks the  
14 fact that the first lawyer withdraw not because he had lost  
15 heart in the correctness of Mr. Charles' case but because he  
16 was threatened with a conflict because some point years and  
17 years ago, he had represented Sony. It was something like  
18 that. But that was the reason that he withdrew, and I quickly  
19 came in.

20 But in terms of there not being a circuit split, let  
21 me just say that Mr. Snyder is, to use his own words "as wrong  
22 as wrong can be." I urge the Court to look closely at *Everly*  
23 to decide whether or not it came to a different conclusion than  
24 *Kwan v. Schlein*. And Mr. Snyder keeps coming back to the *Kwan*  
25 case, completely ignoring the fact that the significant



K9NQchaO

1 difference in *Kwan* was that the challenger -- that the  
2 defendant was herself or himself an author. That's the  
3 distinction here. That's the distinction I have been making  
4 from the beginning; that Mr. Seinfeld is not an author, and a  
5 non-author, and I have not said that Mr. Seinfeld is a stranger  
6 to the show. I'm saying that he is a stranger is to the  
7 copyright because he doesn't own any copyrights. He doesn't  
8 own any copyright as a performer. He doesn't own any copyright  
9 because he didn't write a word. He never claimed to write a  
10 word, and that is the distinguishing factor between our case  
11 and *Kwan* case and the *Stanberry* case and every other case that  
12 has come along prior to *Everly*.

13 THE COURT: OK. I understand your argument.

14 I want to thank counsel on both sides for your  
15 excellent arguments, and I will take this motion under  
16 advisement. Thank you very much.

17 We're adjourned.

18 (Adjourned)